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RUSSIAN PERSPECTIVES ON INTERNATIONAL LAW SYMPOSIUM

## ‘Peaceful’ and ‘Remedial’ Annexations of Crimea

TERO LUNDSTEDT — 19 January, 2018



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This post analyzes the ‘two annexations’ of Crimea in the Russian narrative of ‘reclaiming its historical rights’ over the peninsula in 2014. As many aspects surrounding the occupation of Crimea have been extensively debated in scholarly writings, I will limit my focus on two key concepts that Russia has advanced: Ukraine’s ‘peaceful annexation’ of Crimea in 1991; and Russia’s ‘remedial annexation’ of Crimea in 2014. My main aim is to demonstrate, through these two concepts, the practice under which Russia treats the post-Soviet states inconsistently by making some of their borders contingent upon varying criteria.

While the term ‘peaceful annexation’ had been used by Russian scholars and officials, the term ‘remedial annexation’ is mine, referring to the remedial secession concept that Russia has supported since 2008.

### The Conditional ‘Peaceful Annexation’ of Crimea by Ukraine

The term ‘peaceful annexation’ was first coined by professor Anatoly Kapustin in a ‘Circular Letter to the Executive Council of the International Law Association’ in June 2014, and has been picked up

since by, for example, the Speaker of the Russian State Duma. The narrative goes along these lines: the original transfer of Crimea from Russia to Ukraine in 1954 was achieved unconstitutionally, and should be deemed null and void. Even if it had been constitutional, it was a simple administrative arrangement in a single state, the USSR, and was never supposed to create an international border.

In 1991, Ukraine declared independence from the USSR after this decision had been overwhelmingly endorsed in a referendum (in most areas of Ukraine the pro-independence won with over 90 % of the votes cast, but in Crimea and Sevastopol they only gathered 54 % and 57 %, respectively). However, according to the Russian view, Crimea should not have gone to Ukraine at this point for two reasons: first, because the 1954 transfer was illegal, and, second, because the inhabitants of Crimea had voted to preserve the USSR in the 1991 Soviet referendum. Some Russian scholars see the Soviet referendum results to be applicable in other post-Soviet regions as well.

As Ukraine became independent, Russia accepted the Ukrainian ‘peaceful annexation’ of Crimea only conditionally. These conditions included at the least that Russia could lease the Sevastopol naval base, but perhaps even additional political conditions. For example, in his ‘Crimea Speech’ on 18 March 2014, President Putin said that, in exchange of not letting territorial disputes to ruin their good relations, Russia expected Ukraine to be a friendly state that protects the rights of its Russian speaking inhabitants. This view of the conditionality of some of the post-Soviet states’ borders is nothing new, as this stance has been reflected in Russian official foreign policy documents and statements, for example in relation to Moldova.

Then, as the events of early 2014 unfolded, Russia viewed the situation as Ukraine breaching the conditions of Ukraine’s annexation of Crimea and resorted to remedying the situation by reclaiming its ‘historical rights’ over the peninsula.

One can identify rather quickly at least five legal problems with the assertions above.

First, the original transfer followed the USSR’s constitutional requirements for territorial transfers. The transfer was later

accordingly codified in the 1977 USSR Constitution, the 1978 Russian Constitution and the 1978 Ukrainian Constitution. Thus, the claim for the illegality of the transfer fails to convince.

Second, when the USSR dissolved, all the former Soviet Republics agreed to apply an international legal principle called uti possidetis juris, which transformed their former internal administrative borders into international borders at the moment of the dissolution of the USSR. Accordingly, all 15 Soviet Republics (Russia, Ukraine, Georgia etc.) became independent within their former administrative borders. This left Crimea undisputedly inside the new state of Ukraine. In addition, Russia has explicitly demanded that its borders with Estonia should not be redrawn, but to be based on uti possidetis juris principle. Russia is displaying obvious inconsistency with its attitude towards the post-Soviet borders.

Third, Russia acknowledged the Ukrainian borders including Crimea time and time again, in both bilateral and multilateral agreements, at the auspices of the Commonwealth of Independent States (CIS), and in Russian internal legislation. The conditionality of the borders was not reflected in any of these documents.

Fourth, Crimeans had indeed voted for the preservation of the USSR in March 1991, as had Ukrainians. However, the situation had changed drastically by the time of the Ukrainian independence referendum in December 1991, where Crimeans likewise supported independence of Ukraine.

Finally, the three agreements that regulated the Sevastopol lease do not contain any references that the breach of them would result in Ukraine losing sovereignty over Sevastopol, let alone the whole peninsula.

All these justifications seem to have been created out of necessity to justify acts that are against international legal norms and Russian international law doctrine, as well as against numerous international agreements that Russia is a party to. They also seem to reflect the arguments of Putin's Crimea speech. As summarized by Chris Borgen, 'Russia is building a revisionist conception of international law to serve its foreign policy needs'.

## The ‘Remedial Annexation’ of Crimea by Russia

Now that I have explained the Russian reasoning not to respect Ukrainian territorial integrity over Crimea, I will proceed to my second point, the justifications given for remedying the situation via annexation.

Remedial secession is a controversial international law doctrine, according to which people are entitled to secede from an existing state under exceptional circumstances. These circumstances may include gross and systematic human rights violations or equally systematic denial of their right to internal self-determination. In either case, the exhaustion of all peaceful remedies is an additional prerequisite.

Prior to 2008, Russia used to advocate against any right to secession in absence of an agreement with the parent state. The Russian Constitutional Court had affirmed that territorial integrity is stronger than a right to secession in the *Tatarstan* (1992) and *Chechnya* (1995) cases. Nevertheless, after Kosovo’s declaration of independence and, especially, after the Georgian War (February and August of 2008, respectively), Russia began to advocate on behalf of the right to remedial secession. Indeed, when officially recognizing Abkhazia and South Ossetia as independent from Georgia, Russia gave remedial secession as the priority justification, enhanced by references to the legal precedent that the independence of Kosovo had created earlier that year. Russian justifications failed to convince that time, since its claims of ‘genocide’ by Georgia were later rejected by an independent fact finding commission, and it was followed in recognizing Abkhazia and South Ossetia by a mere four states, as compared to 114 recognitions of Kosovo (as of 20 November 2017). Additionally, the fact finding commission explicitly stated that Kosovo has not created a legal precedent for remedial secession.

Remedial secession has some support among international scholars, organizations and states alike. For instance, 11 states advocated the right to remedial secession under contemporary international law in the 2009 Written Proceedings of the Kosovo Advisory Opinion at the International Court of Justice (ICJ). The Russian Written Statement reflected the new attitude by positing that while usually self-

determination should be exercised within the existing state, in truly extreme situations, such as an outright armed attack by the parent state that threatens the very existence of the people in question, remedial secession can be justified. Nevertheless, the majority of states rejects the right to remedial secession, based on the lack of state practice. Unfortunately, the ICJ did not address remedial secession in the 2010 Advisory Opinion.

In 2014, Russia argued again for remedial secession. According to the Russian view, Crimea used its right to remedial secession, was then recognized as being independent by Russia and was then, finally, incorporated into the Russian federation as a federal subject. However, the requirements for remedial secession, such as the threat to the very existence of the Crimean people, were quite implausible. There was confusion among Russian scholars on how to fulfill these requirements. For example, while Kapustin and the Chairman of the Russian Constitutional Court maintained that there were physical threats, professors Tomsinov and Tolstykh concentrated on 'cultural genocide', brought about by, inter alia, unequal treatment of the Russian language in Crimea. The case had to be strengthened with a series of alternative justifications, most importantly by the will of people to unify with Russia, as expressed in the March 2014 Crimean referendum. In addition, the whole new concept of 'peaceful annexation' of 1991 was introduced, alongside the conditionality claim.

The decision to annex – or, according to the official Russian narrative, to incorporate – Crimea, rather than to recognize it as independent, was most likely made out of necessity: its independence would have received equally scarce support in the international community as those of Abkhazia and South Ossetia; and Russia would have had to secure rights to build up additional military defenses in Crimea in any case to ensure that the secession would not have been re-remedied by Ukraine.

### Conclusions

To summarize the key points above, according to the Russian view, Crimea was annexed twice within a 23-year timespan: first, illegally and the second time legally. This is problematic, first of all, since

although some Russian officials had refused to recognize Crimea as a part of Ukraine, the ‘peaceful annexation’ narrative was only invented in 2014 to retrospectively justify Russian actions.

Second, the tendency of Russian foreign policy statements and doctrines to put some of the post-Soviet borders under explicit conditions is in contradiction with contemporary international law and can have highly disruptive consequences. Notably, prior to the Georgian War of August 2008, the Russian Special Envoy to NATO warned that it was unlikely that Ukraine and Georgia would get to keep their current borders if they joined NATO. Moreover, according to the latest Foreign Policy Concept (2016), in order to keep its current borders, Moldova needs to remain neutral (i.e. not to join any Western institutions). Indeed, it is important to notice that despite all the rhetoric, Crimea is not that special in the pervasive Russian policy towards the post-Soviet states. Before the remedial annexation of Crimea, Russia had recognized the remedial secessions of Abkhazia and Ossetia, and even warned in advance that it was contemplating these actions.

Finally, and to conclude, any assertions to ‘historical rights’ have to be strictly opposed if they violate numerous international agreements, acts of most respected international organizations, and fundamental norms of international law, as does the case of Crimea. Most countries in the world would have reasons to claim ‘historical rights’ or correct ‘historical wrongs’. Nevertheless, in the contemporary world, based on sovereign equality of states that are respecting each other’s territorial integrity and political independence, and conducting their relations under the United Nations Charter, there can be no remedying of international borders apart from mutual agreement.

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